ernment at command for the execution of its decrees and mandates; but in point of fact there was no hostility shown to it at any time. By all loyal persons of intelligence, and by many whose loyalty was very questionable, its advent was welcomed with cordiality, and its course of administration was almost universally approved.

THE COMPETENCY OF WITNESSES. RULE OF EXCLUSION FOR INTEREST.

The passage of an act by Congress, at its last session, repealing the rule of evidence excluding witnesses from testifying, in civil actions, when "parties to or interested in the issue tried,"[1] makes it opportune to examine the grounds upon which that rule has been placed by writers on the law of evidence. We have long been persuaded, that the rule in question is alike illogical and inexpedient. The repeal of it as a rule of practice in the federal courts, generally not the earliest to become the theatre of what may be styled novelties in the law, is an unexpected stroke of good fortune, if the rule is a bad one, but an exhibition of hasty legislation, if a good one. Coming in as an amendment to an appropriation bill, the suspicion that so sweeping a change in the law may have been the effect of partisan scheming, is calculated to throw doubt on its permanence, and, perhaps, to some extent, on its propriety.

We hope, however, the law will be fairly tried, and that instead of repealing it, when the purpose of enacting it has been subserved, it will be enlarged and amended.

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[1] The act is entitled "An act making appropriations for sundry civil expenses of the Government for the year ending 30th June, 1865, and for other purposes." The 3d section is as follows:

"And be it further enacted, That the sum of four hundred thousand dollars is hereby appropriated, out of any moneys in the Treasury, not otherwise appropriated, for the purpose of meeting any expenses in detecting and bringing to trial and punishment, persons engaged in counterfeiting Treasury Notes, Bonds, or other securities of the United States, as well as the coin of the United States; Provided, That, in the courts of the United States, there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to or interested in the issue tried."

The tendency of the times is manifestly to abolish, so far as it can be done safely, rules of exclusion, and to allow all parties, having litigation in our courts, to state the facts as they appear to them, leaving the effect of those statements, as evidence, to be determined by the jury or the court.

What is the ground upon which the rule has been placed by our best writers on the law of evidence?

It is, that, as a general statement, founded on the common experience of mankind, a witness testifying in a cause wherein he is "a party to or interested in the issue to be tried," may fairly be presumed rather to lie than to tell the truth; in other words, that, taking all the cases together, the probability that such testimony will be false or colored, is so great, that the interests of justice require it to be stated as a legal presumption, not liable to be disputed by evidence to the contrary. From this it is inferred, logically enough, that inasmuch as general rules must be established, in order to make the attainment of justice practicable, it is expedient that such testimony should be wholly excluded.

Chief Baron Gilbert says:—"When a man, who is interested in the matter in question, comes to prove it, it is rather a ground for distrust, than any just cause of belief; for men are generally so short-sighted as to look at their own private benefit, which is near to them, rather than to the good of the world, which is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such biassed testimony than to believe it." Gilb. Ev. 722, 3d Edition.

So, Mr. Starkie says:—"This rule of exclusion, considered in its principle, * * is founded on the known infirmities of human nature, which is too weak to be generally restrained by religious or moral obligations, when tempted and solicited in a contrary direction by temporal interests. There are, no doubt, many whom no interested motive could seduce from a sense of duty, and by their exclusion this rule may, in particular cases, operate to shut out the truth. But the law must prescribe general rules; and experience renders it probable that more mischief would result from the general reception of interested witnesses than is occasioned by their general exclusion." Evid. Vol. I., p. 18, 6th Edition.

Mr. Greenleaf, still more explicitly, says:—"If the purposes of justice require that the decision of causes should not be

embarrassed by statements generally found to be deceptive, or totally false, there must be some rule designating the class of evidence to be excluded; and, in this case, as in determining the ages of discretion and of majority, and in deciding as to the liability of the wife for crimes committed in company with the husband, and in numerous other instances, the common law has merely followed the common experience of mankind. It rejects the testimony (1.) of parties; (2.) of persons deficient in understanding; (3.) of persons insensible to the obligations of an oath; and (4.) of persons whose pecuniary interest is directly in issue; not because they may not sometimes state the truth, but because it would ordinarily be unsafe to rely on their testimony." Evid. Vol. I., § 327.

Now, in the first place, in reference to the presumption lying at the basis of the rule, as enunciated, we insist, that it assumes the general untrustworthiness of testimony at the present day, in large classes of cases, without sufficient proof; that it is liable, in other words, to the objection, that it begs the question. For, so far from admitting this assumption to be well founded, we deny it, and appeal confidently to the experience of mankind, whether men and women, in general, even under circumstances which appeal to their interest, are not disposed to be truthful rather than untruthful; and whether even their prejudiced and colored affirmations are not generally partial truths, and not falsehoods, needing only that the sources from which they are derived should be multiplied, whilst their number is increased, to lead unerringly to the whole truth? Nay, such is the ingenuity required to construct a lie with circumstances, so as not to betray the maker under an adroit cross-examination, that we appeal to the same experience whether, as a general rule, from mingled lies and truths, or from lies alone, when coming from diverse sources and skilfully confronted with each other, the exact truth is not quite certain to be the outcome.

2. The rule of evidence to which we are objecting, was established many hundred years ago, but it does not follow that it is therefore wise or expedient now, if it ever was. The march of civilization, and much more of Christianity, has at once softened the manners and elevated the morals of the nations of Christendom. There can be no doubt, that the average man of to-day is far more truthful than that of the sixteenth century, and he, than that of the fourteenth, and so on. It is the uniform

testimony of all who mingle with savage races, and especially with savage contaminated by contact with more civilized races, that their oath is no better than their word, which is good for nothing. And in this respect, the savage of our time is, doubtless, the counterpart of the savage of the middle ages in England or on the Continent, or of that of Rome or Greece fifteen or eighteen centuries ago. But, what is important for our purpose to note, is, that at every step from those remote periods to our day, the number of those who can be so characterized has been growing less and less; and the rules of evidence, thought necessary with safety and certainty to extract the truth from a mingled mass of truth and falsehood, have been forced to accompany our race in its progress, *haud passibus æquis*, it is true, but still within such a distance as not wholly to offend its average sense of justice.

Thus, in the Roman law, the rule of exclusion was much more strict than under that of England; it forbade father and son, patron and client, guardian and ward, from giving evidence for each other; a servant or other dependent was also incompetent to give evidence for his master (Pand. lib. 22, tit. 5, s. 140); parties who, by the English and American law, are constantly admitted as witnesses for and against each other. The Louisiana Code, derived from the Civil law of Rome, embodies some of the same restrictions. It prevents not only husband and wife, as in the English law, but ascendants and descendants from testifying for or against each other. But, partaking of the same tendency to amelioration, it has stopped in the race of restriction far short of its European original. In America, as compared with the mother country, the same tendency is observable, though, unhappily, not so much so in the rules of evidence as in those relating to real property and to personal rights. Few things are more difficult than to carry through changes in a code of laws or in legal practice. The consequence is, that they retain forms impressed upon them by accident or by the public will, long after the reason for them has ceased to be apparent, commonly because "*ita lex scripta est.*"

But whether the tendency to mitigation we have mentioned be actual or not, and if so, whether the occasion of it is to be sought in a higher and higher morality, blossoming out as time advances, or in a growing conviction, from age to age, that rules of exclusion are a mistake altogether, we regard it as beyond

question, that, for our time, they are violations at once of expediency and of the principles of sound reasoning.

Before proceeding to justify this assertion, let us see what is involved in the idea of a general rule.

A general rule, like the one in question, covering several distinct classes of cases, A., B., C., and D., must hold true, in the main, of each of those classes considered separately. If that were not so, the class of which it would not be true, say A., ought not to have been embraced within it; it should have been excepted from the operation of the principle embraced in the rule.

So, if we take any one of the classes comprised within the rule, as B., and subdivide it into other classes, no matter how minute, *of which a definite description can be previously given*, as *a*, *b*, *c*, and *d*, the rule must, in like manner, apply generally to each of those subdivisions, and for the same reason. Human wisdom is too weak to select, by prior designation, out of a mass of cases governed in the main by the same principles, a portion of them, and deny the application to it of those principles. If there be in fact exceptions from the operation of the principles affirmed in the rule, they will make their appearance as individual cases, and will appeal to the discretion of courts and juries, by whom alone the circumstances making them exceptions can be estimated.

Consider, now, in the light of this explanation, the two great classes of cases covered by the late law of Congress, "parties to, and parties interested in, the issue to be tried." Of these the rule asserts, that it is more probable that they and, as a general thing, all the sub-classes of which they are composed, will lie or falsify, than tell the truth.

The best works on evidence, however, do in fact establish in relation to them certain exceptions from the operation of the rule as generally stated, namely, of cases in which, although the rule is still supposed to hold in regard to them, "parties to or interested in the issue to be tried," are nevertheless allowed to testify on other and independent grounds, such as public policy, the necessities of justice, &c.

Some of these cases we will now consider.

1. In many of the States, parties are admitted to prove, by their own oath, their books of original entries, to maintain actions of book account or of assumpsit: *Eastman* vs. *Moulton*, 3 N. H.

156; *Weed* vs. *Bishop*, 7 Conn. 128; *Fredd* vs. *Eves*, 4 Harrington 385; *Webb* vs. *Pindergrass*, Ibid. 439; *Robbins* vs. *Merritt*, 31 Maine 451; *Poultney et al.* vs. *Ross*, 1 Dallas 238.

Here, the exception is based, not on any alleged greater truthfulness of business men who keep their own accounts, but on the ground that, if the exception were not allowed, there would be a failure of justice, because of the impossibility of otherwise making the requisite proof. There is no doubt but that such a failure would occur, and we have no quarrel with the tribunals which admit such testimony. But the true question is, what does the admission of such testimony imply in relation to its truthfulness or untruthfulness? If the presumption were not indulged that, in general, merchants, farmers, or professional men swearing to their own books would testify truthfully, or so that out of their statements the truth could be sifted by the court or jury, the rule establishing the exception would be absurd and iniquitous. We know that such is the presumption; that the testimony of such witnesses is commonly regarded as trustworthy; or, if it be at all suspicious, that the exercise of ordinary adroitness will determine its weak points and require the case there to be strengthened.

2. The party's own oath is admitted also, when it has already been proved that he, against whom it is offered, has been guilty of some fraud, or other tortious and unwarrantable act of intermeddling with the complainant's goods, and no other evidence can be had of the amount of damages. 1 Greenl. Ev. § 348; *Herman* vs. *Drinkwater*, 1 Greenl. R. 27; *County* vs. *Leidy*, 10 Barr 45; *Sparr* vs. *Wellman*, 11 Mo. 230; *Snow* vs. *Eastern R. R. Co.*, 12 Metc. 44.

Thus, to give the cases commonly cited, where a man ran away with a casket of jewels, he was ordered to answer in equity, and the injured party's oath was allowed as evidence, *in odium spoliatoris:* 1 Greenl. Ev. § 348. So, at law, where a shipmaster received on board his vessel a trunk of goods, to be carried to another port, but on the passage he broke open the trunk and rifled it of its contents; in an action by the owner of the goods against the shipmaster, the plaintiff proving *aliunde* the delivery of the trunk and its violation, was held competent as a witness, on the ground of necessity, to testify to the particular contents of the trunk: Id. § 348.

Now, why is the oath of the party here allowed, and why is it

required that it should have been preceded by other evidence touching the *corpus delicti?* Two theories may be formed to answer these questions. First, it may be urged, that the prior testimony of another witness is required to establish the guilt of the defendant, such testimony being regarded as true; and that then that of the party is received, not as being true at all, but as probably false, in order to mete out punishment, on the principle of "an eye for an eye and a tooth for a tooth," to one whom the law no longer regards as deserving of either justice or mercy; or, secondly, it may be maintained, that the testimony of both sorts is admitted, because it is believed, in general, to be truthful; as alike embodying, if not the whole truth, fragments of it, from which the whole may, by tact and skill, be reconstructed.

In our opinion, it needs but to state the alternatives, to see which is to be adopted. The theory that the law entertains such *odium* against spoilers of other men's goods, that, the fact of guilt once established, they are abandoned as a prey to their victims, from whom, by the theory, not truth, but perjury, is in general to be expected, is not for a moment to be entertained. The Jewish maxim of retribution would in such a case be converted into "both eyes for an eye, and the whole set of teeth for a tooth," &c., as the interest or vengeance of the suitor might determine.

The public necessity, then, which admits such testimony, is a necessity, that the sources from which truth may be inferred should be multiplied, in order that justice may be done, not that there may be inflicted upon the wrongdoer, to gratify the passions of his victim, injustice and outrage. The *odium* of which the law speaks, ceases when the limit is reached where actual damage ends and vengeance begins.

3. Another exception to the rule, standing on similar grounds, is, where a witness for the prosecution is admitted to testify, though he will be entitled, upon conviction of the offender, to a reward from the government, to a restoration of the property claimed as stolen, or to a portion of the fine or penalty inflicted. 1 Greenl. Ev. § 342. Here, again, the general rule is suspended, often in actions where the personal liberty of the offender is at stake, and where the witness is manifestly under the strongest bias against him from interest, if not from passion. Does the law assume that the testimony thus admitted will, as a general

rule, be false, or that it will be true? The ground on which its admission is put in the books is, that of public policy. "The public," says Greenleaf, "has an interest in the suppression of crime and the conviction of criminals;" and he adds, "The distinction between these excepted cases and those which fall under the general rule, is, that, in the latter, the benefit resulting to the witness is created chiefly for his own sake and not for public purposes." Ibid. All this is true; but the real question is, what is supposed to be the quality of the testimony of such a witness? A man accused of crime is presumed to be innocent until proved to be guilty. If the object of buying testimony by rewards be to ascertain who the guilty really are, and not to find a pretext for punishing the innocent, that testimony must be presumed, as a general thing, to be true. And what matters it for whose sake, or for what purpose, the benefit, on which the witness has his eye, was created? The true inquiry is, is the benefit a real one, and will it, for that reason, debase the quality of the testimony rendered under its influence?

4. A common exception, also founded on the necessities of public justice, is that of agents, carriers, brokers, or servants, when called to prove acts done for their principals in the course of their employment. 1 Greenl. Ev. § 416.

The reason given for admitting such persons to testify, though within the terms of the rule, and under a strong bias to protect their employers or to shield themselves from the consequences of their own acts, is, that "otherwise affairs of daily and ordinary occurrence could not be proved, and the freedom of trade and commercial intercourse would be inconveniently restrained." Ibid.

But does not this imply, that if they are admitted, there will be no failure of proof; that is, that their testimony will in the main be true?

5. A fifth exception, made by most authors, is that of a witness whose interest had arisen by his own act, and without the interference of the party calling him, after the fact, to which he is called to testify, happened: *Jackson* vs. *Rumsey*, 3 Johns. Cas. 237; *Rhem* vs. *Jackson*, 2 Dev. 187; *Hafner* vs. *Irwin*, 4 Ired. 529; *Baylor* vs. *Smithers*, 1 Litt. 105; *Long* vs. *Baillie*, 4 S. & R. 222; *McDaniel's Will*, 2 J. J. Marsh. 331; *Price* vs. *Wood*, 7 Mon. 223; *Clark* vs. *Brown*, 1 Barb. 215.

The principle of this exception is, that the interests of justice will not allow, that a party should be deprived of testimony by *ex post facto* fraud or collusion. But, well considered, the presumption indulged by those who admit such a witness, is, that, if compelled to take the stand, he will so testify, that the party will not be deprived of evidence which will make for his interest; or, in other words, that although it is apparent, from the statement of the case, that the witness is under a double bias, first, from unfriendliness to the party calling him, and second, from pecuniary interest, created for the purpose of rendering himself incompetent to testify in his favor, nevertheless, when wrung into the case, under oath, he will speak the truth.

Now, it will be observed, the above exceptions are based upon independent grounds, regarded as not conflicting with that which is laid down as the basis of the rule. That is to say, the rule is supposed, in its generality, not to be at all affected by those exceptions, but to be left in full force, covering completely those as well as all other cases, the exceptions being made, as we have seen, on the ground, not of the superior truthfulness of the witnesses specified in them, but that public necessity requires the suspension of the general rule in those cases. If our reasoning, however, has been correct, what is the result of admitting, that men will commonly tell the truth in the excepted cases? Why, that the general rule, considered as a logical formula, is absurd from beginning to end. For, can it be that men, in cases where falsehood cannot be discovered, as in those comprised within the above exceptions, will be more likely, in the long run, to speak the truth, than in those in which a departure from it would be exposed to certain and speedy detection?

This reasoning is strengthened by adverting to certain other exceptions clearly and upon the same grounds established by our law.

Thus, in criminal causes, individuals who, in their own persons or in those of their friends, have been the victims of violence, or of wrongs worse than violence, are daily allowed, without objection, to appear as witnesses against their wrongdoers. Technically, such witnesses are not parties to, or interested in, the issue to be tried, and so are not within the letter of the rule of exclusion. But the distinction is known by everybody to be wholly without reason. If men will ever be guilty of prevarication, of falsehood, or of perjury, they will be most likely to be

so when testifying in cases where their feelings are most enlisted, that is, in criminal trials. And, as a matter of fact, we know there are no persons admitted to testify in our courts, in whom is apparent a fiercer or more unequal struggle between native honesty on the one hand and passion on the other, between an instinct which bids them speak the truth and a desire in the particular case to lie, than in these. But the law says, "admit these witnesses; it is probable their testimony will be prejudiced, and in many cases false, but the tact and experience of judges and counsel will sift the false from the true." Does a slight difference in the record, unsuspected by the witness, known only to the court and counsel, change the intrinsic character for truth and veracity of the one, or affect the degree of skill with which his testimony will be scrutinized by the others?

The law has also said, that in Chancery cases, although the same rule of exclusion shall ordinarily prevail, based upon a similar presumption of general untruthfulness, defendants may be made witnesses by their opponents, on the condition, that the latter shall be bound by their answers, true or false, if responsive to the bill. But, is it right for a court thus to allow complainants, relying on their belief that they will win, to take their chances in a lottery, where to its superior wisdom it is certain, as a general rule, that they will lose; when it knows that the testimony which their common sense tells them will probably be true, will, on the contrary, be false or deceptive?

If it is objected to this view, that the cases in which defendants would be called on to answer under oath would be those, commonly, in which their character for veracity would be so well known, that complainants would be unlikely to be mistaken about it, or, if they were, that they would have only themselves to blame; the answer is: that if that be admitted, the difficulty still remains. Complainants may be mistaken; we all know that they frequently are; they would themselves readily admit that they are quite likely to be; and the court asserts, implicitly, by the rule in question, that they will be so mistaken in a majority of cases. What shall be said of a tribunal, which, admitting this presumption, nevertheless holds itself ready to receive as evidence the colored or lying statements of such witnesses, if the parties consent to it? Can it be a court of *justice* when it announces beforehand that, if asked to do so, it will render decrees upon testimony which it knows will be generally false?

The fact is, neither courts nor juries believe any such thing. They believe, as do all men, not writers of books of evidence, that witnesses, in general, are truthful; that any number of them sufficient to constitute a class, with like features or in similar circumstances, will be so likewise, or that when they fail, they will furnish *data* for the correction of their own half-truths or untruths.

Thus, the exceptions we have been considering, if based on necessity, the general rule still being supposed to cover them, upset the rule itself. And they would still more clearly do this, if made on the ground that the rule does not in principle cover them. For admit, as we have said, the general truthfulness of interested testimony, given when detection of falsehood, from the circumstances of the excepted cases, would be well-nigh impossible, and it is absurd to deny it in any other class of cases whatever.

But the advocates of the rule of exclusion may shift their ground, and insist that the real scope and design of the rule are to require the best evidence; that where the testimony of witnesses, therefore, not "parties to or interested in the issue to be tried," can be had, it should be produced, and the less trustworthy be excluded. Suppose it be admitted, contrary as we believe to the fact, that such are the intent and scope of the rule. Why not then put it on that ground? Why not limit its operation to cases in which better evidence can be found than that coming from the parties themselves? Such a rule, though not the best one, in our opinion, would obviate one of the greatest practical objections to the rule, as it is, namely, that there are numberless cases, familiar to every lawyer, which are absolutely beyond the reach of any remedy for want of evidence lying only in the breast of the parties. Abrogate this senseless rule and allow parties to testify, and only consummate wickedness linked with preternatural cunning would be able to baffle the efforts of courts and counsel to arrive at the truth.

As we have said, under the operation of the existing rule, there is no remedy at all in divers cases, because the courts will not hear the only witnesses who know the facts. How many such cases there are, it is not easy to say, but reckoning those in which justice either limps or wholly fails for that reason, they are perhaps one-tenth as numerous as all the cases in our courts.

It is true, the law has provided a device by which the truth, in

such cases, may sometimes be attained, notwithstanding the rule of exclusion; namely, that of bills of discovery. But the provision is inadequate, and is made at the expense of the rule itself. The remedy is ineffectual, because not commensurate with the evil it was designed to obviate. The injured party, having brought his suit at law, is allowed to appeal to the conscience of the opposite party by bill in equity, and to require him to answer such interrogatories as he may put to him, under oath. But suppose the opposite party has no conscience. There being no counter-oath of the complainant, the defendant's answer is to be taken as true, without denial or explanation, and, if adverse, the injured party is cast in both suits and pays all the costs. But why allow the appeal at all, as we have before asked, if, as a general rule, in such cases the answer would be false? And if it would generally be true, why limit the giving of testimony to the defendant? If there is a presumption to be indulged, is it not, that he who complains to our courts not only has a grievance, but is as truthful a man as he of whom he complains?

Thus, we think it is clear, that the rule in question is illogical —based on a premise which at this day is erroneous, namely, that men who are interested in a suit, either as parties or pecuniarily, if called as witnesses, will, in general, testify untruthfully. To some extent also the inexpediency of the rule has, we think, been made to appear; but a glance at the rule as it ought to be, will make it still more evident.

We think the fact that a man is a party to the record, or interested in the event of a suit, ought to go to his credibility and not to his competency, reversing the maxim, that presumes men in general to be liars, and making it run, that they are *prima facie* worthy of belief, or at least of a hearing and a candid judgment. If such a rule were established, it would be easy to make allowance for cases where it might work injustice. In the administration of estates of deceased persons, if it were judged unwise to trust to the oath of the surviving party only, an exception could be made requiring the oath of the creditor to be fortified by other testimony. So, in such other cases as presented similar grounds of objection. Perhaps, even, it might be thought advisable to prescribe, that the best evidence should, in certain contingencies, be produced, along with that which is likely to be less trustworthy: thus, if disinterested witnesses existed, it might be required, at the instance of either party, to produce

them, under regulations looking to the prevention of injustice and the saving of expense, and yet not forbid, but regularly, in the first instance, permit the introduction of the testimony of the parties in interest. Why should the courts decline to profit by the admissions and denials of those who are cognisant of the facts, any more than the same individuals would, if examining into the origin of an affray in front of their own doors? Once provide, that, whatever be the testimony, and by whomsoever given, the tribunal to judge of it shall hear, but be at liberty to believe or reject it, as it may seem just, and the danger of overwhelming it by false testimony will be very slight.

One consequence of such a reversal of the rule would be, that a case would rarely arise which the courts could not reach for want of testimony; another, that fewer cases would be decided improperly, because decided upon a partial view of the facts; another, that the rules of evidence, purporting to be based on human experience, would be made to harmonize with it, and not be, as now, belied by it; and thus the respect men are always inclined to feel for their courts of justice would be heightened, or at least be justified.

As a fitting close, we are happy to append an extract from the report of the commissioners, appointed by the Legislature of New York to frame the present code of that State, bearing upon the subject we have been considering, as follows:

"The abrogation of the rule which excludes a witness who has an interest in the event of the action, has been frequently proposed and discussed in this State. We think the time has come for effecting it. The rule appears to us to rest upon a principle altogether unsound, that is, that the situation of the witness will tempt him to lying.

"The reason strikes at the foundation of human testimony. The only just inquiry is this: whether the chances of obtaining the truth are greater from the admission or exclusion of the witness? Who, that has any respect for the society in which he lives, can doubt that, upon this principle, the witness should be admitted? The contrary rule implies, that, in the majority of instances, men are so corrupted by their interest that they will perjure themselves for it, and that besides being corrupt, they will be so adroit as to deceive courts and juries. This is contrary to all experience. In the great majority of instances the witnesses are honest, however much interested, and in most cases of

dishonesty the falsehood of the testimony is detected and deceives none.

"Absolutely to exclude an interested witness is, therefore, as unsound in theory as it is inconsistent in practice. It is inconsistent, because the law admits witnesses far more likely to be biassed in favor of the party than he who has merely a pecuniary interest. A father may testify for his son; a child living with his father, and dependent upon his bounty, may appear as his witness, nay, as his only witness, without question. Is the immediate gain of a dollar, by the result of a cause, so potent to outweigh integrity, while affection, consanguinity, dependence, are put down as dust in the balance? There is not another rule in the law of evidence so prolific of disputes, uncertainties, and delays, as that we are considering. Not a circuit is held, but question after question is raised upon it; nor a term where exceptions growing out of it are not debated. Some of the foregoing reasons apply also to the exclusion of a person sentenced for felony. It is wiser, we cannot doubt, to place the witness on the stand and let the jury judge of his testimony." 1 Phil. Evid. pp. 25–26, note. J. A. J.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Massachusetts.

JAMES B. THAYER, ADMINISTRATOR, *vs.* W. W. WELLINGTON *et al.*

A will duly attested, giving a certain sum of money to T. and W. in trust, "to appropriate the same in such manner as I may, by any instrument in writing, under my hand, direct and appoint," and an appointment by a separate paper, signed by the testator, but not duly attested, declaring the appropriation and naming the beneficiary, does not create a valid bequest in favor of the person thus declared and appointed by the unattested instrument.

This case was heard before the full court, upon bill, answers, and evidence. The facts will sufficiently appear in the opinion delivered by the court.

B. R. Curtis and *C. T. Russell*, for the city of Cambridge.